IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 288

WALTER WILLIAMS, PETITIONER

vs.

NATIONAL SURETY CORPORATION

A.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

KENNETH W. COULTER,
BOONE T. COULTER,
EDWARD H. COULTER,
Little Rock, Arkansas,
For Petitioner.

CORPORATION SERVICE COMPANY, LITTLE ROCK, ARK.

INDEX

AUTHORITIES CITED

Cases

STATUTES AND RULES

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1.

SUMMARY STATEMENT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Walter Williams, prays that a writ of certiorari issue to review the judgmen' of the United States

Circuit Court of Appeals for the Eighth Circuit entered in this cause.

The unreported judgment of the United States District Court for the Little Rock Division of the Eastern District of Arkansas (R. 59) was entered on March 14, 1939. The opinion of the United States Circuit Court of Appeals (R. 257) reversing the judgment of the United States District Court was written by Judge Thomas, Judges Stone and Sanborn concurring, and was filed April 9, 1940. Judgment (R. 265) was entered pursuant thereto on that date. Petition for rehearing (R. 266) was filed on April 23, and overruled (R. 270) on May 1, 1940. The case is reported in 110 Fed. (2d) 873.

The questions presented in the United States Circuit Court of Appeals, which it is desired to have reviewed in this court, are:

1. Whether the decision of the Eighth Circuit Court of Appeals is in conflict with the provisions of the full faith and credit clause of the federal constitution by reason of the following:

(1) By reason of the failure to give effect to the recital of the judgment of the Arkansas state court that there was "a balance in said guardian's hands as of June 10, 1933, of $4,553.46 unaccounted for," and in holding that this recital "is not a finding * * * that the guardian had these funds in his possession on June 10, 1933."

(2) By reason of the failure to give effect to the rule announced in the case of *In re Kenlon Coal Co., Inc.*, 264 N. Y. S. 473, by the highest court of the State of New York by which the question has been considered to the effect that the identical assumption contract involved in this action binds the respondent herein to pay all "losses of which notice might be given to that company after May 1," 1933, and in holding that the burden was on plaintiff "to prove that the losses occurred after May 1, 1933, and (2) that they arose out of, or were caused by, acts of the guardian committed after May 1, 1933," it being admitted that no such notice had been given in this case on or prior to that

date, and that respondent had agreed to hold for the purpose of paying such claims not so reported the sum of $6,392,-362.00 of the funds received from the old company, and it being further admitted that $3,485.91 of the sums sued for came into the guardian's hands after that date.

2. Whether the decision of the Eighth Circuit Court of Appeals is in violation of the provisions of the due process clause of the federal constitution by reason of the holding to the effect that respondent herein did not become liable to petitioner by reason of its taking from the assets of the original surety on the bonds involved herein its entire capital investment, consisting of (1) more than $11,000,000.00 in cash and liquid securities at their market value, and (2) the other assets enumerated in clause IX of the assumption agreement, to which assets petitioner had the right to resort for satisfaction of his claim, leaving the original surety able to pay only 10% of its obligations, and creating in respondent a thoroughly solvent corporation, with no consideration from respondent to the original surety therefor other than (1) the obligations assumed in clause II. c of the assumption agreement, which clause expressly assumed the obligation of satisfying petitioner's claim, and (2) the capital stock of respondent, which stock was pledged to a particular creditor to the exclusion of petitioner, in order to procure the release of more than $5,000,000.00 of said assets from the lien of said pledgee, and by reason of the holding, in the light of these facts, to the effect that respondent took all of said assets free from any claim of petitioner by virtue of the provisions of the exemption clause, III. c, of said assumption agreement.

3. Whether the Eighth Circuit Court of Appeals erred in deciding certain issues of law in such manner as to conflict with the local decisions on said issues by the highest court of the State of Arkansas, in the following particulars, to-wit:

(1) In failing to follow the settled rule in Arkansas to the effect that all of the provisions of the assumption agreement involved in this action must be construed in their entirety, and some reasonable meaning be given to all the

harmonious provisions thereof, and that in case of conflict or ambiguity in said provisions, the same must be construed most strongly against the party who prepared the contract; and in failing to construe clauses II. c. and III. c. of said agreement together, in keeping with the local rule, to the effect that respondent was exempted by said clause III. c., when read in connection with clause II. c., only from "liability for losses arising from, or caused by, acts committed prior to May 1, 1933," *as to which notice was received by the Old Company prior to midnight of April 30, 1933.*

(2) In holding that respondent, after assuming the obligation to pay the claim of petitioner (and others similarly situated), as provided in clause II. c. of the assumption agreement, could, in a later clause, III. c., of said agreement, without any additional consideration, limit or evade its obligation, and stipulate against liability for an assumed loss that had not accrued and which could not, under Arkansas law, mature until final accounting, it being the rule in, and public policy of, Arkansas that such obligation can not be limited or evaded by contract.

(3) In giving to the unverified, unsupported, unsigned purported "account" of the guardian a construction or legal effect, in conflict with that to which it was entitled under Arkansas law, that would justify the overturning of the recitals of the judgment of the state court (with no showing as to what additional evidence was before the state court), and in deciding this case on such erroneous construction.

4. Whether the Circuit Court of Appeals erred in denying the motion of this petitioner to dismiss in that court the appeal of respondent herein on the grounds that the transcript of the record was not lodged in that court within the time provided by law, and (1) that the eighty-four assignments and sub-assignments or points of error were too prolix, and did nothing more than complain of certain findings and conclusions of the trial court made and refused, and did not complain of any ruling, order or judgment of the trial court, and, for that reason, were insufficient to raise any question for review,

(2) and that such assignments were wholly abandoned in said court, and a new specification adopted, which was not based on the assignments or points asserted in connection with the appeal, and which new specification itself was insufficient to present any question for review.

The petition for the writ of certiorari in this cause is based on the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229 (43 Stat. 398 (28 USCA 348)), and involves the effect of the due process and full faith and credit clauses of the Constitution of the United States, and the effect of a question of local law, together with an important question of procedure.

The facts of the case are undisputed, and are as follow:

On August 3, 1926, Gordon Freeman was, by order of the Probate Court of Union County, Arkansas (R. 42), appointed as guardian of the person and estate of Walter Williams, a minor (and of the persons and estates of other minors not material here), and filed his bond (R. 43) in the sum of $10,000.00, which bond, however, is not involved in this action. On February 1, 1927, upon the sale of certain mineral properties belonging to the estate of said minor for the sum of $14,500.00 (R. 78), the guardian, pursuant to a special statute (Sec. 6279, *Pope's Digest*) of Arkansas, tendered his bond, (R. 44) in the sum of $29,000.00, conditioned that he would "faithfully account to his said wards for all moneys or other considerations arising from, growing out of, or accruing under, said royalty deed," on which bond National Surety Company of New York was surety, this bond having been filed in the proceedings and approved by the probate court on that date (R. 45). On February 1, 1927, the Union Probate Court made an order (R. 39) directing the guardian to file an additional bond in the sum of $10,000.00. Pursuant to said order, the guardian, on that date, filed his additional bond in said sum, and in the regular statutory form for a guardian's bond, with National Surety Company as surety thereon, which bond was approved on that date (R. 46-47),

the conditions thereof being that the said "Freeman shall faithfully discharge his duties aforesaid, according to law."

Walter Williams reached his majority on March 30, 1933 (R. 47); and, on June 10, 1933, "the said Gordon Freeman, Guardian, filed his purported settlement, which was the only settlement ever filed by said guardian." Exceptions were filed to said report; and, on the hearing thereof, the probate court found that the guardian was indebted to his ward in the sum of $5,224.81. (R. 2). The guardian appealed; and, on a trial in the circuit court, it was found that the guardian was indebted to his ward (R. 49) in the sum of $8,253.46 on June 10, 1933. Judgment was entered for that amount, and the judgment was ordered certified back to the probate court as the judgment thereof.

Of the above sum of $8,253.40, the court specifically found that there was "a balance in said guardian's hands as of June 10, 1933, of $4,553.26 unaccounted for." As to the remaining $3,700.00, the judgment was silent as to when it was in the hands of the guardian, or when he disbursed it, or when it was repaid to him, or whether it was repaid. The item arose out of certain loans made by the guardian, and was simply charged back against him.

In the course of the trial in the district court, it was stipulated (R. 74-75) that the loans were made in the following sums and on the following dates:

William Turnage, February 7, 1928, ...	$4,000.00
William Turnage, May 10, 1929, ...	3,000.00
Christine Bryan, August 27, 1929, ...	1,800.00

It was also stipulated that all three of the mortgage debts bore interest at 8% per annum from their date (R. 107), and that payments were made (R. 107) on the loans as follow:

On the $4,000.00 mortgage:

February 7, 1929, ...	$1,820.00
February 7, 1930, ...	200.00
December 30, 1933, ...	281.55
March 31, 1934, ...	105.00

March 21, 1934,	2,994.36

On the $3,000.00 mortgage:

May 10, 1930,	$ 302.40
December 31, 1932,	279.39
June 3, 1934,	105.00

It was also stipulated (R. 75) that the properties covered by the mortgages were at all times of a value equal to the debt secured by each. The above payments, under the Arkansas statutes, would have kept these mortgages in force until March 31 and June 3, 1939 (Sec. 8934, Pope's Digest).

No appeal was perfected from the judgment of the State Court above mentioned, which was entered on November 8, 1937. (R. 40).

A payment of $660.00 was made on the judgment on November 10, 1937.

On April 29, 19[illegible], National Surety Company was taken over by the Insurance Commissioner of the State of New York (R. 139-143) for rehabilitation. On that date, it submitted to the Insurance Commissioner of New York, and to the New York Court that had taken jurisdiction, a certain plan of rehabilitation (R. 157), which plan, among other things, proposed the organization of a new company (the respondent herein) to take over certain of the assets and to assume certain obligations of the old company. The plan thus submitted provided:

> "The New Company will assume and agree to pay * * * * all losses (of the Old Company) occurring or reported on and after May 1, 1933."

The plan submitted also provided that the New Company would take over the following assets of the Old Company (R. 159) having "convention" and "market" values as indicated:

National Surety Corporation
Tentative Balance Sheet as of March 31, 1933

Assets taken from Old Company	Convention	Quotable Securities at Market
Cash (R. F. C. Loan Pending)	$ 373,715	$ 373,715
Cash on Hand	831,189	831,189
Outstanding Premiums	4,035,059	4,035,059
Accounts Receivable	32,858	32,858
Stocks and Bonds	6,662,590	4,902,051
Real Estate	372,723	372,723
Mortgages	1,460,400	1,310,400
	$13,768,534	$11,857,995

With respect to the above mentioned $11,857,995.00 turned over to the New Company by the Old Company, the New Company represented to the Insurance Commissioner (R. 147, 159), and to the New York Courts (R. 143, 159), in its efforts to have the reorganization plan approved, and to creditors, and to the public generally (R. 190-191), that it would take and hold these assets for the following purposes (R. 159, 190 191):

Capital Stock of the New Company,	$ 1,000,000.00
Surplus of the New Company,	3,000,000.00
Commissions,	738,000.00
Past Due Premiums,	727,633.00
To Pay "Losses incurred but not reported,"	6,392,362.00
	$11,857,995.00

The foregoing, which, together with the agency contracts, designs, emblems, trade marks, agency plants, furniture, fixtures, equipment, supplies and miscellaneous properties described in a certain bill of sale (R. 184), constituted the entire capital structure of the New Company, came, in its entirety, from the assets of the Old Company. (R. 228).

On the said date of April 29, 1933, the rehabilitation plan submitted was approved, and the National Surety Company, acting by and through the Insurance Commis-

sioner, entered into a contract (R. 10, 166) with National Surety Corporation, respondent herein, the New York corporation organized on that date for that purpose, under which contract it was agreed that the New Company should receive the above enumerated assets of the Old Company in return for the capital stock of the New Company, and in consideration of the assumption by the New Company of the obligations of the Old Company enumerated in the contract. The enumerated assumptions that are material here were:

> "II. The New Corporation, subject to the exclusions, exceptions and conditions hereinafter contained, hereby assumes liability for, and agrees to pay:
>
> "(a) * * * * *
>
> "(b) * * * * *
>
> "(c) All losses occurring on and after the 1st day of May, 1933, and all losses as to which no notice was received by the Old Company prior to midnight of April 30, 1933, * * * *, as hereinbelow enumerated, subject, however, to, and limited by, the exclusions and exceptions set forth and described in paragraph III hereinafter contained:
>
> "(1) * * * * *
>
> "(2) Surety bonds and obligations, including but not to be limited to fiduciary court bonds, judicial court bonds, construction contract bonds, license and miscellaneous financial guarantee bonds, motor vehicle bonds and depository bonds."

Clause III (c) of the contract purports to enumerate the exclusions and exceptions and reads:

> "III. It is understood and agreed that the assumption of liability by the New Corporation under the provisions of paragraph 'II (c),' ante, is subject to the following exclusions and exceptions:
>
> "(a) * * * * *
>
> "(b) * * * * *
>
> "(c) Liability for losses arising from, or caused by, acts committed prior to May 1, 1933, under fidu-

ciary court bonds covering risks involving estates held or administered by persons or corporations acting in a fiduciary or trust capacity."

Under said contract, the New Company took over the above enumerated assets of the Old Company. (R. 159). The Old Company had borrowed from the Reconstruction Finance Corporation $11,000,000.00, and had hypothecated certain assets to secure the same, these hypothecated assets having a book value of over $30,000,000.00, and an estimated market value of $14,000,000.00. (R. 149). The above mentioned $11,857,995.00 delivered to the New Company included more than $5,000,000.00 of the stocks and bonds (R. 123) held by the Reconstruction Finance Corporation as part of the collaterals pledged to secure the debt due by the Old Company to it. In order to procure a release of this portion of these pledged securities, and as collateral security for the debt of the Old Company, the capital stock of the New Company was also pledged to the Reconstruction Finance Corporation. (R. 229). This stock was later sold for $10,030,000.00 (R. 122), and the proceeds distributed to creditors. To what creditors the fund was distributed does not specifically appear, though, presumably, the fund would have gone to the pledgee, the Reconstruction Finance Corporation, which as a matter of law, held a prior lien on the stock.

On June 1, 1934, National Surety Company was placed in receivership for liquidation, "and paid to its creditors one dividend of 10% only" (R. 40), the business of the company having been wound up and the ancillary receivership in Arkansas having been terminated on September 16, 1936. (R. 232). The New Company (respondent herein) is "very solvent." (R. 127).

It is admitted that the loss involved here was not reported to the Old Company until after May 1, 1933, (R. 128), the same not having been discovered or ascertained until after that date.

The amount involved is not in controversy. It is admitted that, after deducting the $660.00 payment and adding accrued interest, the amount due was $10,420.08 on

December 10, 1938, to which sum accrued costs to that date and interest and costs accruing thereafter should be added. (R. 41).

This action was instituted in the Circuit Court of Pulaski County, Arkansas, on November 16, 1937, (R. 18), to recover the amount due by the guardian as against respondent, to the amount of the obligations assumed by it. The action was bottomed on the judgment of the probate court (R. 7) fixing the amount due; on the bond of National Surety Company in the sum of $29,000.00 (R. 5), dated February 1, 1927; on the bond of National Surety Company in the sum of $10,000.00 (R. 6), dated February 19, 1927; and on the agreement and contract of assumption between National Surety Company and National Surety Corporation (R. 10), dated April 29, 1933; and on the legal result of its taking over the assets of the Old Company. It was also alleged (R. 3) that the clause of the contract in question seeking to exclude liability was invalid and void, as being in violation of the due process clause of the federal constitution, and that the losses sued for accrued after May 1, 1933, and "that the National Surety Company had received no notice of the loss or liability prior to midnight of April 30, 1933."

In apt time, the cause was removed to the federal court on the petition of defendant, and no issue was raised as to the propriety of the removal.

On January 24, 1938, after the removal of the cause to the federal court, appellant filed its answer (R. 27), in which it asserted:

> "That it denies each and every allegation in the complaint of plaintiff, and that it specifically denies that it is indebted to the plaintiff in the sum of $7,593.46 or any other sum."

An amended answer was filed on the date of the trial. The complaint and the amended answer were treated by the parties in the trial court as raising the following issues on behalf of each party, which were asserted in both the trial court and in the Circuit Court of Appeals:

The plaintiff asserted and contended:

1. That the exemption clause of the assumption agreement was invalid as being in contravention of the due process clause of the federal constitution, and as being an effort to relieve defendant of a liability, which, having been once assumed, could not be limited by contract, either before or after such liability had accrued, it being the settled law in Arkansas that no liability accrued until final accounting, and that the liability herein assumed could not be limited by contract;

2. That the federal constitution required that the judgment of the Arkansas court holding that the guardian had in his hands, on June 10, 1933, $4,550.46 of the funds in question, and that the judgment of the New York Court holding that the contract here involved obligated respondent to pay all losses of the company reported after May 1, 1933, be given full faith and credit in this action;

3. That, in any event, under the local rule in Arkansas, the assumption agreement, by its express terms, bound defendant to pay the losses involved herein, for the following reasons:

(1) That the contract assumed the obligation to pay all losses of which the Old Company had received no notice on May 1, 1933, and that the admitted facts show that no such notice as to the losses involved in this case had been received on that date;

(2) That, by operation of law, respondent was liable by virtue of its having taken over the assets of the original debtor corporation;

(3) That, even though the exemption clause was not invalid, and even though respondent was not liable by virtue of its having taken over the assets of the original debtor corporation, still defendant would be liable under the express obligation to assume all losses occurring after May 1, 1933.

The defendant asserted and contended:

1. That the exemption clause of the assumption agreement was valid, and that, without any exceptions

whatever, it relieved defendant of all liability for losses under obligations of the Old Company occurring, or caused by acts committed, prior to May 1, 1933, and that neither the lack of notice by the Old Company, nor the recitals of the judgment of the Arkansas State Court, nor the repayments to the guardian of any sums due on the mortgages in question after May 1, 1933, rendered defendant liable for any sums in excess of $155.75, for which sum defendant offered to confess judgment, it being admitted that that amount was wrongfully converted by the guardian after May 1, 1933.

The State Court in Arkansas expressly held that the guardian as of June 10, 1933, held in his hands all of the funds due to plaintiff, except $3,700.00 disbursed on unauthorized loans, and the agreed facts showed that repayments were made on petitioner's interest in these loans in the sum of $3,703.85, the sum of $2,342.95 having been repaid on his interest therein after May 1, 1933.

In the trial in the district court, the defendant, in addition to the stipulations, admissions and evidence of facts above set forth, in order to overcome the recitals of the judgment of the Arkansas State Court to the effect that there was (R. 9) "a balance in said guardian's hands as of June 10, 1933, of $4,553.46 unaccounted for," and to sustain the issues in its favor generally, introduced in evidence, over the objections (R. 76-77, 77,36) of plaintiff, a certain purported "account" or "settlement" of the guardian filed in the probate court. The "account" had not been signed or sworn to by the guardian, was not supported by vouchers, canceled checks, receipts, testimony, or other evidences of its correctness. (R. 78-105). Objections were interposed to said account, which cast the burden on the guardian to support the same by evidence or proof, and rendered the same insufficient, under the settled rule in Arkansas, to make even a prima facie showing of correctness. The State Court, upon consideration of all of the evidence before it, allowed the guardian credit for certain items listed on the "account," but ignored the dates under which such items were listed. There was no showing in the federal trial court as to what other evidence was before

the State Court when it rendered its judgment.

The United States District Court found and decided the issues in favor of plaintiff as to the entire sum due, and entered judgment against the defendant for that sum, and denied specific requests (R. 247) for findings or conclusions to the effect that the loss of the $4,397.11 item was caused by improper expenditures made prior to May 1, 1933, or that the loss of the $3,700.00 item was caused by the making of the unauthorized loans.

With no other evidence of any kind before it, except the "account" above mentioned on which to base its action, the Circuit Court of Appeals disregarded the recitals of the judgment of the State Court to the effect that there was "a balance in said guardian's hands as of June 10, 1933, of $4,553.46," and disregarded the stipulation made in the district trial court to the effect that $6,087.70 had been repaid on the mortgage debts in question, with no showing that said funds had been thereafter disbursed, the sum of $3,485.91 having been admittedly repaid after May 1, 1933, and disregarded the holding of the New York Court to the effect that respondent was bound to pay all losses of the Old Company reported after May 1, 1933, and held that the "account" was sufficient to overcome the recitals of the judgment of the State Court and to sustain the contention of the defendant to the effect that all disbursements (except $155.75) by the guardian were made prior to May 1, 1933, and reversed the judgment of the district court, indicating that its action in doing so was in harmony with the decisions of the New York Courts on the construction of the contract here under consideration. The only case of the New York Courts in which the contract was the basis of the suit is that of *In re Kenlon Coal Company, Inc.*, 264 N. Y. S. 473. The court there said:

> "Considering the fact that in consideration for the assignment of the premiums payable the new corporation took over the liablities on all the old bonds, together with any losses, of which notice might be given to that company after May 1, the assignment virtually amounts to a payment by the old company to the

new as consideration for assuming the reinsurance of the old risks."

When the judgment (R. 59) was entered in the trial court on March 13, 1939, the following endorsement was placed thereon:

> "The exceptions of the defendant, National Surety Corporation, to the within judgment are hereby saved, and the said appellant, having prayed an appeal, the appeal is allowed."

Execution was issued on the judgment; and, on March 28, 1939, respondent filed a formal notice of appeal (R. 233), a supersedeas bond (R. 234), and obtained an order (R. 248) recalling the execution. On May 2 (R. 248), more than 40 days after the notice of March 13, and again on May 26, 1939 (R. 249), respondent procured orders extending the time for lodging the transcript to June 20, 1939. The record was actually lodged on June 17, 1939, more than ninety days after March 13, 1939, but within the period as extended by the orders of the district court. No excuse for the delay appears in the record.

After entry of judgment in the district court, defendant filed eighty-four assignments and sub-assignments or points of error, the first three of which (R. 238) complain of certain findings and conclusions of the trial court, the next fifty-four (R. 238-245) of the failure of the trial court to make certain findings of fact requested by defendant, and the next twenty-seven (R. 245-247) of the failure of the trial court to reach certain conclusions of law requested by defendant. No one (or all combined) of the assignments complained of any ruling, order or judgment of the trial court. In the Court of Appeals, all of these purported "assignments" or "points" were abandoned, and a new specification, likewise insufficient to raise any question for review, was urged, said specification (R. 269) being:

> "The district court erred in finding that the National Surety Corporation was liable to the plaintiff, Walter Williams."

Plaintiff, appellee in the court of appeals, moved to

dismiss the appeal (R. 256-7) on the grounds that the record was not filed in that court within the time required by the Rules of Civil Procedure; and, later, amended to allege that the assignments filed were too prolix, and were insufficient to raise any question for review; that they were abandoned, and a new specification adopted in the Circuit Court of Appeals which was not based on any of the points or assignments filed, and which, itself, was insufficient to raise any question for review. The Circuit Court of Appeals, in denying the motion, said:

> "The Rules of Civil Procedure * * * superseded all former methods of appeal in civil cases to which they are applicable. * * * The order of extension of time for filing the record in this court made on May 2, 1939, was within the 40-day period prescribed by subsection (g) of rule 73." * * * *
>
> "The gist of the second ground of the motion is that the points and specifications of error are too voluminous and prolix. The assignments are subject to criticism in this regard, but under the circumstances present we are not disposed to dismiss the appeal for this reason. The Rules of Civil Procedure were new at that time, and counsel were exercising an abundance of caution. The motion to dismiss the appeal is denied."

II.

REASONS FOR ALLOWANCE OF WRIT

Because of the importance of a rule of federal practice and procedure, and because of the magnitude of the business transacted by National Surety Company, and of the large number of cases in which the contract here in question is and will be involved, and because, from the nature of the contract, many minors and mental incompetents will be affected, and because of the fact that the effect of the transaction here under review, and some of the questions presented thereunder, have not been, but should be, settled by this Court, and because of the fact that it is believed that the action of the Eighth Circuit Court of Appeals in

this case is in conflict with the provisions of the due process and full faith and credit clauses of the federal constitution, and with the applicable rules of local law in Arkansas, and with the applicable decisions of this Court, it is believed that the writ of certiorari should issue herein to the end that the decision and judgment of the Circuit Court of Appeals may be reviewed and the issues involved herein settled.

Respectfully submitted,
Edward H. Coulter,
Boone T. Coulter,
Kenneth W. Coulter,
Little Rock, Arkansas,
For Petitioner.

B.
BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.
OPINIONS OF THE LOWER COURTS

The trial in the United States District Court for the Eastern District of Arkansas was held before the Honorable Thomas C. Trimble (R. 60), presiding judge, on March 14, 1939. No opinion was filed in that court. The opinion (R. 257) of the Circuit Court of Appeals was written by Judge Thomas, Judges Stone and Sanborn concurring, and was filed April 9, 1940. It is reported in 110 Fed. (2d) 873.

II.
JURISDICTION

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229 (43 Stat. 398 (28 USCA 347)). The judgment of the Circuit Court of Appeals was entered (R. 265) and became final on May 1, 1940, and a certified copy of the record, and the petition for certiorari, with supporting brief, are filed within three months from the date of the judgment. The case involves, primarily, the effect of the due process and full faith and credit clauses of the federal constitution in the construction of an as-

sumption contract or agreement between National Surety Corporation, the respondent, and the Insurance Commissioner as Rehabilitator of National Surety Company, in the light of applicable decisions of the Arkansas and New York State Courts, and secondarily, the question of the effect of a local rule as to the effect or weight to be given to a guardian's account or settlement that is insufficient under the state rule, and as to the effect of a local rule of construction of contracts, and an important question of procedure in the matter of filing the assignments or points of error.

III.

STATEMENT OF CASE

The facts are stated in the petition; and, for the sake of brevity, they are not here repeated.

IV.

SPECIFICATIONS OF ERROR

The specifications of error have been set out in substance under "Questions Presented," and are substantially repeated under "Argument;" and, in the interest of brevity, are not here set out.

V.

ARGUMENT

1. *The decision of the Circuit Court of Appeals in this cause was in conflict with the provisions of the full faith and credit clause of the federal constitution because of its failure* (1) *to respect the recitals of the judgment of the Arkansas State Court in this cause or* (2) *to follow the applicable decision of the New York State Court in construing the contract involved herein.*

(1) The Arkansas State Court judgment in this case (R. 47) recited:

> "That, as such guardian for the said Walter Williams, there came into the hands and possession of the said Gordon Freeman the sum of $11,887.32 belonging to said ward, Walter Williams; * * * * (R. 48) said guardian accounted for the expenditure of $7,333.86, * * * * (R. 49) leaving a balance in said guardian's hands as of June 10, 1933, of $4,553.46 unaccounted for."

With respect to the foregoing recital, the Circuit Court of Appeals said (R. 265):

> "It is not a finding, when fairly construed, that the guardian had these funds in his possession on June 10, 1933."

(2) The New York State Court, in the only case that has ever been before it in which the assumption agreement involved in this action was the basis (in all of the other cases, the actions were founded on an exparte certificate of the Surety Corporation wholly different from the contract here involved), in construing that agreement, said:

> "Considering the fact that in consideration for the assignment of the premiums payable the new corporation took over the liabilities on all the old bonds, together with any losses of which notice might be given to that company after May 1, 1933, the assignment virtually amounts to a payment by the old company to the new company as consideration for assuming the reinsurance of the old risks."
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> *In re Kenlon Coal Co., Inc.*, 264 N. Y. S. 473, 191 N. E. 521.

The Circuit Court of Appeals refused to follow the construction placed on the assumption agreement by the New York court in the above case, and held that the Surety Corporation was not liable in the instant case, though it was admitted (R. 128) that no notice of the losses in the instant case was received prior to May 1, 1933. The holdings of the Circuit Court of Appeals, with respect to both of the foregoing situations, were in conflict with the provisions of Section 1, Article IV., of the Constitution of the United States:

> "Full Faith and Credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

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2. *The decision of the Circuit Court of Appeals in this cause was in conflict with the provisions of the due process clause of the federal constitution because the de-*

cision permits the Surety Corporation to take assets of the Old Company, free of any claim on the part of petitioner, of the market value of $11,857,995.00, to which assets petitioner had the right to resort for the satisfaction of his claim.

There is no disputed issue of fact in connection with this transaction. All of the assets of the Surety Corporation came from the Old Company (R. 228). Those assets had a market value of $11,857,995.00 (R. 159), in addition to the value of the other numerous assets described in clause IX of the assumption agreement. No consideration was paid for these assets by the Surety Corporation other than its assumption of the liabilities assumed in clause II. c. of the assumption agreement, and its capital stock (R. 229), and that was pledged to the Reconstruction Finance Corporation to procure the release of the assets held by it, so that the ultimate effect of the transaction was to put this large amount of assets beyond the reach of petitioner, leaving the Old Company able to pay only 10% of its debts (R. 40) and creating a New Corporation that was "very solvent." (R. 127). The Circuit Court of Appeals, however, held:

> "It is therefore clear that on the evidence in this record the appellee's contention can not be sustained."

In an earlier case, however, *National Surety Corporation v. Ellison*, 88 Fed. (2d) 399, 406, the same court, in construing the effect of this identical transaction, said:

> "The consideration for the assumption of liability passing to appellant consisted of a large part, if not all, of the valuable assets of the surety on the bond, to which assets the appellee had a right to look for the payment of his claim. Under these circumstances, the appellant, after the consent of the appellee to the assumption agreement, became the principal obligor and the liability of the National Surety Company secondary only."

The holding of the Circuit Court of Appeals on this issue, was, it is believed, tantamount to depriving petitioner of his property without just compensation therefor, con-

trary to his constitutional guaranties that he shall not be deprived of his property "without due process of law."

The decision in this case is, without doubt, contrary to the local rule in Arkansas. *Arlington Hotel Company v. Rector*, 124 Ark. 190, 186 S. W. 622, 629.

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3. *The Circuit Court of Appeals erred in deciding this case on principles of law which are in conflict with settled rules of local law in Arkansas, in the following:*

(1) *The Circuit Court of Appeals erred in failing to give effect to the provisions of the assumption agreement in their entirety.*

The two pertinent provisions of the contract under examination, with respect to the losses here urged, are sections "II (c)" and "III (c)."

Under section "II (c)," with reference to the class of losses here under review, the Surety Corporation assumes and agrees to pay:

> "All losses occurring on and after the first day of May, 1933, and *all losses as to which no notice was received by the Old Company prior to midnight of April 30, 1933.*" (Italics ours).

Under section "III (c)," with respect to the class of losses here involved, it is set out that the Surety Corporation is exempted from liability for the following:

> "Liability for losses arising from, or caused by, acts committed prior to May 1, 1933."

The two foregoing clauses must be read and construed together, and every word, phrase and clause, of both, must be given its ordinary meaning, if possible; and, in case of any ambiguity, the construction most favorable to plaintiff, rather than to the Surety Corporation, must be adopted. When so read and construed, there is no ambiguity or uncertainty, and the limiting clause contained in section "II (c)" must be incorporated in section "III(c)" also, which would make it provide for exemptions only of the following:

"Liability for losses arising from, or caused by, acts committed prior to May 1, 1933," *as to which notice was received by the Old Company prior to midnight of April 30, 1933.*

The settled rule in Arkansas requires that the above construction be given these clauses of the assumption agreement.

"It is a familiar rule of construction that no word in a contract should be treated as surplusage and disregarded if any meaning which is reasonable and consistent with the other parts thereof can be given. The contract should be construed so that each part should take effect."—*Earl v. Harris*, 99 Ark. 112, 137 S. W. 806; *D., K. & S. Ry. Co. v. M. & N. A. Ry. Company*, 104 Ark. 475, 149 S. W. 60; *Yellow Jacket Mining Co. v. Tegarden Bros.*, 104 Ark. 573, 149 S. W. 518; *Hughes v. El Dorado Union Oil Co.*, 160 Ark. 342, 254 S. W. 663; *Fowler v. Unionaid Life Insurance Co.*, 180 Ark. 140, 20 S. W. (2d) 611.

"A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions."—*American Insurance Union v. Rowland*, 177 Ark. 875, 8 S. W. (2) 542; *Fowler v. Unionaid Life Insurance Co.*, 180 Ark. 140, 254 S. W. 663.

"Another rule of construction is that, where there is any doubt as to the meaning of a contract, it will be resolved against the party who prepared the contract."—*Bracy Bros. Hdwe. Co. v. Herman-McCain Const. Co.*, 163 Ark. 133, 259 S. W. 384; *McClain v. Reliance Life Ins. Co.*, 170 Ark. 478, 280 S. W. 15; *Walden v. Fallis*, 171 Ark. 11, 283 S. W. 17; *Marley v. Hackler*, 176 Ark. 238, 3 S. W. (2d) 20; *Silbernagel & Co. v. Taliaferro*, 186 Ark. 470, 53 S. W. (2d) 999; *Dewey v. Benton County Lumber Co.*, 187 Ark. 917, 63 S. W. (2d) 649; *General American Life Insurance Co. v. Frauenthal & Schwarz*, 193 Ark. 663, 101 S. W. (2d) 953.

The bonds in question here were made in Arkansas, were to be performed in Arkansas, and were governed by the Statutes of Arkansas. Neither the original surety, nor

the succeeding surety, respondent herein, could limit the liability under said bonds as fixed by the Arkansas statutes, and the rules of construction in Arkansas would be applicable. *Mutual R. F. L. A. v. Minehart*, 72 Ark. 630, 83 S. W. 323; *Springfield Mutual Association v. Atnip*, 169 Ark. 968, 279 S. W. 15.

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(2) *The Circuit Court of Appeals erred in holding that respondent herein, after assuming the statutory liability for the claim of petitioner under the Arkansas bonds, could without any consideration therefor, evade or limit that liability under a later clause of the assumption agreement.*

The obligation under a guardian's bond in Arkansas is a continuing one, and exists until the guardian finally accounts and turns over the assets to the beneficiary. *Dugger v. Wright*, 51 Ark. 232, 11 S. W. 213; *Beakley v. Cunningham*, 112 Ark. 71, 181 S. W. 287; *Diffie v. Anderson*, 137 Ark. 151, 208 S. W. 428; *White v. New Amsterdam Casualty Co.*, 195 Ark. 249, 11 S. W. (2d) 477. And no cause of action accrues until there has been a final accounting by the guardian. *Sebastian v. Bryan*, 21 Ark. 447; 451; *Norton v. Miller*, 25 Ark. 108; *Connelly v. Weatherly*, 33 Ark. 93; *Vance v. Beattie*, 35 Ark. 93; *State v. Buck*, 63 Ark. 218, 37 S. W. 881; *Waldrop v. Cooper*, 192 Ark. 1017, 96 S. W. (2d) 19. The bonds in question, being statutory bonds, the liability thereunder could not be limited by contract. *Crawford v. Ozark Insurance Co.*, 97 Ark. 549, 134 S. W. 951. To permit the Surety Corporation to deplete the assets of the debtor corporation in a large sum, and, thus, contribute to its inability to meet its obligations, and then to permit it successfully to plead that it limited or evaded its liability under the Arkansas statutory bonds, by contract, before those liabilities accrued, would be doing violence to the public policy of Arkansas.

(3) *The Circuit Court of Appeals erred in giving to the purported "account" of the guardian a legal effect or construction contrary to that to which it was entitled under Arkansas law.*

The so-called "report" of the guardian was neither subscribed nor verified by the guardian (R. 104) and was, for that reason, insufficient to make a prima facie showing of its correctness under the provisions of Section 1437 of Pope's Digest of the Statutes of Arkansas, which provides:

> "Every pleading must be subscribed by the party or his attorney, and the complaint, answer and reply must each be verified by the affidavit of the party to the effect that he believes the statements thereof to be true."

Moreover, no vouchers, receipts, canceled checks, or other evidences of correctness were attached. (R. 72, 105). Objections to the purported report were filed. (R. 2). The guardian failed to take the stand to testify in support of the correctness of his account. (R. 47). The objections interposed cast the burden on the guardian. This burden he failed to meet. The rule in Arkansas on this point is definitely settled in a guardianship case:

> "* * * * the guardian did not introduce evidence to sustain his account, where challenged, and he would fail on that score. Mr. Woerner says: 'The *onus probandi* rests upon the executor or administrator to establish the validity of any item of credit in the account which is challenged, and for want of sufficient *prima facie* proof such credit will be rejected.' "—
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> *Merritt v. Wallace*, 76 Ark. 217, 218-19, 219 S. W. 876.

Notwithstanding the foregoing facts, and the rule in Arkansas, and without any showing as to what additional evidence was before the Arkansas State Court, the Circuit Court of Appeals, basing its action on the challenged report alone, gave to the report a legal construction on which it overturned the recital of the judgment of the Arkansas State Court as to the amount on hand on June 10, 1933, and, as to this amount, determined and decided this case

on its merits, contrary to the local rule in Arkansas, using this language:

> "An examination of the settlement leaves no doubt as to the meaning of the judgment entry, for it shows the dates when the expenditures were made; and in view of the ambiguity of the judgment entry it was admissible to show the dates. It shows that all of the items making up the sum of $4,553.46 were expended prior to May 1, 1933, except items aggregating $155.-75, for which appellant admits liability."

And the above mentioned "account" was the only foundation for this statement. This was giving the account a legal effect in direct conflict with that to which it was entitled under the Arkansas statutes and decisions, which statutes and decisions are controlling on this issue. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. The effect of all this is that the Circuit Court of Appeals has taken one scrap of the documentary evidence that was before the state court, which document, under the state law was entitled to no consideration whatever, and on that document alone, with not even any showing as to what additional evidence was before the state court as the basis of its judgment, has overturned the recitals of the judgment of the state court.

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4. *The Circuit Court of Appeals erred in overruling the motion of this petitioner to dismiss the appeal for the reasons that the transcript of the record was not filed in apt time, and that the points of error filed by appellant were too prolix, were insufficient in themselves to raise any question for review, were wholly abandoned on appeal, and a new specification adopted which was not based on the original assignments, and which, itself, was insufficient to raise any question for review.*

This question, standing alone, probably would not justify the issuance of the writ of certiorari; but, if the writ is issued, it is believed to be of sufficient importance to call for corrective action by this court. The facts have

possibly been sufficiently stated. Brevity here prohibits any exhaustive discussion.

The question presented by the original motion is whether or not the endorsement on the judgment was a legal notice of appeal; and, if it was, whether appellant could, by its own act in filing a later notice, extend its time for filing the transcript or procuring an extension of time within which to do so. In other words, is the method of appeal provided by Rule 73 of the Federal Rules of Civil Procedure exclusive?

Under the former practice it was permissible to give oral notice of an appeal in open court; and the granting thereof satisfied the requirements, which were more strict and exacting than are those of our present rule, and dispensed with the necessity of citation or further notice. *Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127; *Dufour v. Lang*, 54 F. 913 (C. C. A. 5); *McNutta v. West Chicago Park*, 99 Fed. 328, (C. C. A. 9); *In re Fichtl*, 107 Fed. 619 (C. C. A. 7); *Swift v. Kortrecht*, 110 Fed. 328 (C. C. A. 6); *King v. Thompson*, 110 Fed. 319 (C. C. A. 6); *Mitchell v. Lay*, 48 Fed. (2d) 79 (C. C. A. 9); *Simpson v. First National Bank*, 129 Fed. 257 (C. C. A. 8); *Prince v. McLaughlin*, 16 Fed. (2d) 886 (C. C. A. 1); *de Toos v. Archuleta*, 64 Fed. (2d) 807 (C. C. A. 10). Has the above mentioned rule changed this practice? We present the matter simply as one of the questions of procedure arising under the Federal Rules of Civil Procedure

It is believed that the notice of appeal endorsed on the judgment of March 13, 1939, was a sufficient compliance with the provisions of Rule 73 of the Rules of Civil Procedure. *Martin v. Clarke*, 105 Fed. (2d) 685 (C. C. A. 7).

If the rule in question does not prescribe the exclusive method of appeal, and if the endorsement on the judgment of the praying and granting of the appeal on March 13, 1939, set in motion the running of the forty-day period, then it would seem that the extending of the time for the filing of the record to a day more than ninety days from that date would be ineffective; and, at least, where no ex-

cuse for the delay appeared, the denial of the motion to dismiss would be an abuse of discretion, and in conflict with the decisions of other circuit courts of appeal. *Wendell v. Hoffman*, 104 Fed. (2d) 56 (C. C. A. 3); *Mutual B. H. & A. A. v. Snyder*, 109 Fed. (2d) 469 (C. C. A. 6).

The holding of the court on the second issue raised by the amendment was a radical departure from a long and unbroken line of decisions, both of that court and of this. *Section 4, Rule 14, C. C. A. 8; Rule 24, C. C. A. 8; Rules 9, 10 (2) and 27 (6), Supreme Court of the United States; City of Lincoln v. Sun Vapor Street Light Co.*, 59 Fed. 756; *Oswego Township v. Travelers' Ins. Co.*, 70 Fed. 255; *Sovereign Camp v. Jackson*, 97 Fed. 382; *Western Assur. Co. v. Polk*, 104 Fed. 648; *Gibson v. Luther*, 196 Fed. 204; *Harris v. United States*, 249 Fed. 41; *Stoffregen v. Moore*, 271 Fed. 680; *Gartner v. Hays*, 272 Fed. 896; *Lawson v. United States*, 297 Fed. 418; *Payne v. Ostrue*, 50 Fed. (2d) 1039; *Columbia Corporation v. Lawton-Byrne-Bruner Co.*, 73 Fed. (2d) 18; *Jones v. Futrall*, 75 Fed. (2d) 418; *Rhorback v. Mutual Life Ins. Co.*, 82 Fed. (2d) 291; *Wade v. Blieden*, 86 Fed. (2d) 75; *Krause v. Snyder*, 87 Fed. (2d) 723; *Matthewson v. First Trust Co.*, 100 Fed. (2d) 121; *Hobbs-Western Co. v. Employers' Liability Assur. Co.*, 102 Fed. (2d) 32; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433; *Stevens v. Glodding*, 19 How. 64, 15 L. Ed. 569; *Buckeye Power Co. v. E. I. Du-pont de Nemours Powder Co.*, 248 U. S. 45, 63 L. Ed. 123; *Chesapeake & D. Canal Co. v. United States*, 250 U. S. 123, 63 L. Ed. 889; *Southeastern Ex. Co. v. Robertson*, 264 U. S. 541, 68 L. Ed. 840; *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 80 L. Ed. 138; *Pa. Ry. Co. v. Pub. Util. Comm.*, 298 U. S. 170, 80 L. Ed. 1130.

The new rules of civil procedure made no changes in the content or form of assignments or points of error, and it would seem that the departure of the court of appeals in this case from the settled rules that have been in force for the greater part of a century, would hardly be justified.

For the reasons, therefore, that it is believed that the decision of the Eighth Circuit Court of Appeals in this

cause is in conflict with the provisions of the full faith and credit and due process clauses of the federal constitution, and with a local rule of law in Arkansas, and with the applicable decisions of this Court and of the Third and Sixth Circuit Courts of Appeals; and for the reason that the particular contract in question and the important questions arising thereunder, are, and will be, involved in numerous actions in which minors and mental incompetents are interested, and have not been, but should be, construed by this Court; and for the reason that an important question on the construction of one of the new Rules of Civil Procedure is presented, it is respectfully submitted that the writ of certiorari should issue in this cause.

KENNETH W. COULTER,
BOONE T. COULTER,
EDWARD H. COULTER,
Little Rock, Arkansas,
For Petitioner.